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May 8, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Via Hand Delivery**

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Re: DiGiPH PCS, Inc.  
Petition for Further Reconsideration; WT Docket No. 97-82

Dear Ms. Salas:

On behalf of DiGiPH PCS, Inc., transmitted herewith are an original and four (4) copies of a Petition for Further Reconsideration in response to the following Commission action: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Order on Reconsideration of the Second Report and Order, rel. March 24, 1998.

If you have any questions with respect to this matter, please do not hesitate to call.

Very truly yours,



Jeanne W. Stockman

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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MAY - 8 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of the Commission's Rules  
Regarding Installment Payment Financing  
For Personal Communications Services  
(PCS) Licensees

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WT Docket No. 97-82

To: The Commission

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PETITION FOR FURTHER RECONSIDERATION

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DiGiPH PCS, Inc. ("DiGiPH"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby seeks further reconsideration of the Commission's Reconsideration Order<sup>1</sup> in the above-referenced proceeding. In support thereof, the following is respectfully shown:

BACKGROUND

In the Second R&O, the Commission adopted a "menu" of restructuring options which allows financially troubled C block personal communications service licensees to reduce their outstanding debt to the federal government.<sup>2</sup> DiGiPH filed a petition for reconsideration of the Second R&O asserting, among other things, that the rules adopted therein penalize those entities,

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<sup>1</sup>In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Order on Reconsideration of the Second Report and Order, rel. March 24, 1998 ("Reconsideration Order").

<sup>2</sup>In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, rel. Oct. 16, 1997 ("Second R&O").

such as DiGiPH, that have justifiably relied on the Commission's earlier rules.<sup>3</sup> On reconsideration, the FCC slightly increased the restructuring relief available to C block licensees. After release of the Reconsideration Order, a federal bankruptcy court held that C block licenses were, in fact, devalued after close of the auction. The bankruptcy court offered more substantial relief than that which is available to C block licensees through the FCC's restructuring options.<sup>4</sup> Indeed, the bankruptcy court's outright reduction of C block debt was a remedy considered by the Commission but not adopted because it would be inequitable.<sup>5</sup> Further, the bankruptcy court ruling centers around a determination of a wholesale reduction in the value of all C block licenses, not just the debtor's licenses. While the FCC has indicated its intent to appeal this decision, pending the outcome of any such appeal, this precedent raises a great deal of uncertainty surrounding the current state of the C block and available restructuring options as the Election Date of June 8, 1998 approaches. Accordingly, DiGiPH requests that the FCC reconsider its decision to proceed with the June 8, 1998 Election Date under the current Restructuring Order and the scheduled Payment Resumption Date of July 31, 1998. In addition, DiGiPH asks that once payments do resume, that the Commission elect a course of action that does not further penalize licensees, such as DiGiPH, that timely submitted their March 31, 1997 installment payments.

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<sup>3</sup>Petition for Reconsideration, WT Docket No. 97-82, DiGiPH PCS, Inc., filed Nov. 24, 1997 ("Petition").

<sup>4</sup>In re GWI PCS, Inc., BK No. 397-39676-SAF-11, Bench Ruling (Bankr. N.D. Tex. 1998) ("GWI Ruling").

<sup>5</sup>Second R&O ¶ 19.

## ARGUMENT

I. In Light of the Relief Afforded GWI in Its Bankruptcy Proceeding, the Commission Must Postpone the Election Date Pending Outcome of that Appeal.

On April 24, 1998, the United States Bankruptcy Court in the Northern District of Texas (Dallas Division) ruled that the award of GWI PCS, Inc.'s ("GWI") C block licenses in January 1997 for \$1.06 billion constituted a fraudulent conveyance under federal bankruptcy rules.<sup>6</sup> The court held that between the time the C block auction closed in May 1996 and GWI's licenses were awarded, C block licenses were severely devalued and worth much less than the \$1.06 billion GWI had bid.<sup>7</sup> The court revalued the transaction at \$166 million, reducing GWI's debt to the federal government by almost 85%, or \$850 million. Under the court's ruling, GWI will be permitted to keep its C block licenses and will be able to apply down payment funds on deposit with the federal government to amounts owing.<sup>8</sup>

The extraordinary relief GWI received in its bankruptcy proceeding is far more substantial than that afforded by the Reconsideration Order. Indeed, in adopting its rules, the FCC considered and expressly rejected arguments that the C block debt should be reduced because such action would be inequitable, undermining the credibility and integrity of the Commission's Rules.<sup>9</sup> In reducing the GWI debt, the court based its decision on a finding that C block licenses as a whole had been devalued by subsequent Commission actions such that the issuance of those licenses constituted a

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<sup>6</sup>GWI Ruling at 31.

<sup>7</sup>Id. at 31-32.

<sup>8</sup>Id. at 43.

<sup>9</sup>Second R&O ¶ 19.

fraudulent conveyance. While the FCC has announced its intention to appeal that ruling, as of this date however, there is valid case law supporting the proposition that the FCC's actions subsequent to the close of the C block auction devalued the spectrum. If that ruling stands, equity mandates that the FCC afford all C block licensees the same relief.

Further, in light of the GWI decision, proceeding with the June 8, 1998 Election Date prior to resolution of this issue would not only be inequitable, but may well have the unintended consequence of promoting additional C block bankruptcies. Any C block licensee which intends to elect a restructuring alternative other than proceeding with its original C block obligation may determine that it is more prudent to file for bankruptcy protection to preserve its C block licenses pending resolution of the FCC's appeal in GWI. In sharp contrast, a C block licensee who proceeds with an election which results in forfeiture of some or all of its spectrum or down payments would be prejudiced in the event that the FCC appeal is unsuccessful. Postponing the Election Date would avoid the undesirable situation of forcing troubled C block licensees to choose between the FCC's restructuring options and the protection of bankruptcy, as a result of the uncertainty created by the GWI ruling. Thus, the Election Date must be postponed until the GWI proceeding is resolved.

The uncertainty surrounding the GWI decision also frustrates the very purpose behind the Election Date, which is to allow C block licensees to bring closure to this matter and move forward with their business plans while allowing the reauction to proceed as expeditiously as possible. If C block licensees opt for the protection of bankruptcy in the hopes of obtaining a GWI "bailout" rather than selecting one of the FCC's options, such licenses will not be available for reauction in the near future. Ironically, the bankruptcy court held that its debt reduction approach was a far more expeditious way to further the Congressional mandate of encouraging small business provision of

telecommunications service to the public than a reauction would be.<sup>10</sup> It is therefore difficult to understand what purpose would be served by proceeding with the presently scheduled June 8, 1998 Election Date and the July 31, 1998 Payment Resumption Date.

Presently, the court's ruling is broad enough to taint the entire C block. The decision is not limited to circumstances unique or particular to GWI, and it contains very general language regarding the devaluation of C block, not just GWI's, spectrum.<sup>11</sup> In the event the FCC succeeds on appeal in having the GWI decision reversed, or at least limited to GWI rather than implicating the entire C block, postponement of the Election Date until after the conclusion of that appeal would preclude licensees from gaming the system in the hopes of obtaining a GWI "bailout." However, if the GWI decision is ultimately upheld on appeal, the integrity of the auction process and fundamental fairness mandate that all C block licensees be afforded the same relief afforded to GWI inasmuch as the appeal concludes that actions of the FCC subsequent to the close of the auction devalued C block spectrum. Postponing the Election Date would allow the FCC to revisit its Restructuring Order to avoid the inequity of allowing licensees that proceed through bankruptcy to obtain more favorable financing terms than those entities that seek to honor their full financial obligation to the federal government. Given the broad nature of the GWI decision and the uncertainty it creates, postponing the Election Date until its resolution is essential to ensuring the continued viability of the C block.

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<sup>10</sup>See GWI Ruling at 37.

<sup>11</sup>See, e.g., *id.* at 19 ("suggesting a major decline in the value of C-block licenses").

II. The Method in which Suspension Interest Must Be Repaid Further Penalizes DiGiPH for Submitting Its March 31, 1997 Installment Payment in Accordance with Commission Rules.

As discussed in its Petition for Reconsideration, DiGiPH tendered its March 31, 1997 installment payment in a timely manner, prior to the eleventh-hour suspension of such payments by the Commission. In the Reconsideration Order, the Commission rejected DiGiPH's argument that the Commission compensate it, and other licensees that submitted the March 31, 1997 installment payment, for being denied the use of those funds. Incredibly, in so holding, the Commission stated that, "[c]ompensating licensees for complying with Commission rules would establish a precedent we consider inadvisable."<sup>12</sup> While the concept of not "rewarding" licensees who comply with the rules is understandable, DiGiPH submits that penalizing those licensees who comply with the rules and rewarding those who did not intend to do so is a much more "inadvisable" precedent. Accordingly, DiGiPH challenges the underlying basis of the Commission's ruling with respect to this issue, and asks that the Commission reconsider that holding to place the equities on the side of the parties that complied with the Commission's rules. While the Reconsideration Order states that the FCC is without authority to pay interest to licensees, such as DiGiPH, who have been denied the use of their monies for more than a year, the Commission is not without remedy to make such parties at least partially whole. In any event, simply stating that those who submitted payments in accordance with the rules are "out of luck" is grossly inequitable.<sup>13</sup> Accordingly, DiGiPH submits that the FCC should model a remedy within its authority to at least make an effort to minimize the

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<sup>12</sup>Reconsideration Order ¶ 30.

<sup>13</sup>It is important to reiterate that, given the late release of the Public Notice suspending the March 31, 1997 installment payment, only those entities who intended to miss the payment benefitted from such suspension. See letter to Regina Dorsey, Chief, Billings and Collection Branch from Jeanne M. Walsh, dated April 9, 1997.

“compliance penalty” set forth in the Reconsideration Order.

Licensees who failed to submit their March 31, 1997 installment payment received compensation in the form of an interest-free government loan for three (3) years. Over a year ago, DiGiPH filed a timely request for a refund of that payment immediately upon the issuance of the FCC’s Public Notice suspending such payments. That request has still not been addressed by the Commission.<sup>14</sup> For the past year, and most recently through the Reconsideration Order, the Commission has persisted in penalizing responsible licensees like DiGiPH for complying with Commission rules and submitting the March 31, 1997 installment in a timely manner. The rationale set forth in the Reconsideration Order for such action is wholly inadequate, failing to justify this treatment and the inequity it creates. The Commission’s retention of the March 31, 1997 installment payment had a real and substantial impact on DiGiPH. The funds used by DiGiPH to meet its March 31, 1997 obligation were borrowed under its credit facility. Accordingly, DiGiPH has been paying interest on those funds for more than a year. In sharp contrast, all non-complying C block licensees not only avoided the costs associated with obtaining those funds, but have also now been granted a three-year interest-free loan. Accordingly, on reconsideration DiGiPH seeks (1) a reasoned analysis to explain why the Commission is entitled to retain funds for a payment obligation it suspended; and (2) to be made whole as compared to those licensees who clearly intended to miss their March 31, 1997 payment obligation.

The Second R&O specifies that Suspension Interest is to be repaid in eight, equal, quarterly installments (“Suspension Interest Payments”). In light of the Reconsideration Order, although the

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<sup>14</sup>DiGiPH notes that this entire matter could have been avoided had the Commission acted on that initial refund request and returned the funds that are rightfully DiGiPH’s.



Commission has never acted on DiGiPH's request for return of its payment, it is now clear that DiGiPH will not be refunded its March 31, 1997 installment payment. Instead, it appears as though DiGiPH will simply have the amount of its Suspension Interest reduced by the value of that payment. Thus, even though DiGiPH made an extra full installment payment, it will still owe eight Suspension Interest Payments (albeit smaller payments than most C block licensees) and will have to come up with an additional installment payment upon the Payment Resumption Date. In other words, not only has DiGiPH not been afforded the three-year interest-free loan in the amount of the March 31, 1997 installment, but DiGiPH will have to make another full installment payment, thereby ensuring that DiGiPH remains a full installment payment ahead on its notes as compared to non-complying C block licensees.

DiGiPH submits that this inequity can be reduced, although not entirely remedied, by allowing those carriers who timely submitted their March 31, 1997 installment payment to suspend the payment of the next installment as it becomes due. Then, after a deferral period equal to that afforded to the C block licensees who missed their March 31, 1997 installment obligation, the amount of the missed installment would then be paid in eight equal installments.<sup>15</sup> This would allow DiGiPH to obtain the exact same "use of funds" as afforded other C block licensees and, over the next three years, make DiGiPH as close to whole as is possible under the present Commission framework.<sup>16</sup> DiGiPH respectfully submits that the relief sought here is clearly equitable and would establish the precedent that the Commission does not disadvantage or otherwise penalize a

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<sup>15</sup>DiGiPH would, of course, immediately commence the payment of its Suspension Interest Payment in eight equal installments.

<sup>16</sup>The Commission's authority to suspend C block interest payments is not in dispute.

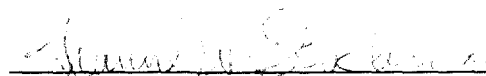
Commission licensee that complies with the Commission's rules when the FCC subsequently suspends those rules and benefits those who otherwise intended not to comply. Contrary to the assertion set forth in the Reconsideration Order, that is the precedent which the Commission must always seek to establish. In the alternative, DiGiPH respectfully requests that the Commission fashion other equitable belief to minimize the "compliance penalty" imposed on it for submitting its March 31, 1997 installment in a timely manner.

### CONCLUSION

In light of the foregoing, DiGiPH respectfully requests that in light of the uncertainty created by the recent GWI bankruptcy ruling, DiGiPH requests that the C block Election Date of June 8, 1998 and the July 31, 1998 Payment Resumption Date be postponed until that proceeding is resolved. Moreover, once C block payments do resume, DiGiPH requests the Commission to take steps to make whole compliant C block licensees who submitted their March 31, 1997 installment payment in a timely manner.

Respectfully Submitted,

DiGiPH PCS, Inc.



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Dated: May 8, 1998